excavations are made, and the soil of a private individual gives way in consequence of being deprived of this lateral support, there is a taking to the extent of such deprivation, for which he is entitled to damages. Stearns *v.* Richmond, 88 Va. 992, 14 S. E. 847. Again it was held, that changes in the grade of streets can be made only by authority of the city council previously given, and changes made therein without such authority can not be validated by subsequent ratification. At all events, rights of action which accrued to abutting owners by reason of such change of grade can not be divested by a subsequent validating ordinance. Page *v.* Belvin, 88 Va. 985, 14 S. E. 843.

NORFOLK & W. RY. CO. *v.* SCRUGGS.

March 1, 1906.

[52 S. E. 834.]

Railroads — Operation — Approach to Crossings — Duty to Sound Whistle.—Acts 1893-94, p. 827, c. 737, required railroad locomotives to sound the whistle at not less than 300 yards before reaching a highway crossing. This act was repealed by Acts 1904, p. 368, c. 253, and the Legislature which repealed it enacted the provisions now found in Va. Code 1904 § 1294d, subsec. 24, which requires railroad locomotives to sound their whistles outside of incorporated cities and towns at a distance of not less than 300 yards from places where the railroad crosses "upon the same level any highway or crossing." Subsection 38 of the same section of the Code declares it to be the policy of the state that railroad crossings over highways shall, whereever reasonably practical, pass above or below the existing structure. Held, that a railroad locomotive is no longer required to blow its whistle on approaching a place where the railroad crosses a highway by means of a bridge over the highway.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 993.]

Error to Circuit Court of City of Lynchburg.

Action by T. B. Scruggs against the Norfolk & Western Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

F. S. Kirkpatrick, for plaintiff in error.

Caskie & Coleman, for defendant in error.

HARRISON, J. The declaration in this case alleges, in substance, that at the point where the plaintiff received the injuries complained of the track of the defendant company crosses the public highway on a hill, with an archway therein through which the highway passes; that just east of the fill is a railway cut; that while the plaintiff was traveling along the highway, in a vehicle drawn by a horse, and was about to pass under the railway track,

without being aware of the approach of any train or engine, one of the engines of the defendant, known as a "pusher," was by the careless and negligent act of the defendant suddenly, and without notice of its approach, run out of the cut and upon the archway through the fill, causing the plaintiff's horse to become frightened, and resulting in the injury for which compensation is sought in damages.

The demurrer to the declaration calls in question the right of the plaintiff to recover upon the facts alleged; it being contended that the defendant company was under no obligation to give notice of the approach of its engine to a highway not crossed by it at grade or on the same level.

The notice required of railroads in approaching highway crossings is regulated in this state by statute. The history of our legislation on the subject is brief and of comparatively recent date.

The first act relating to the matter was approved March 5, 1894. This statute, so far as pertinent, provides that: "A bell and a steam whistle shall be placed on each locomotive engine operated on any railway in this state, and said whistle shall be at least twice sharply sounded, not less than three hundred yards before a highway crossing is reached." Acts 1893-94, pp. 827-828, c. 737.

The last act relating to the subject is to be found in the recent public service corporation act, approved January 18, 1904. This statute provides that: "Every railroad company whose line is operated by steam, shall provide each locomotive engine passing upon its road with a bell of ordinary size, and steam whistle, and such whistle shall be sharply sounded outside of incorporated cities and towns, at least twice at a distance of not less than three hundred yards nor more than six hundred yards from the place where the railroad crosses upon the same level any highway or crossing, and such bell shall be rung or whistle sounded continuously or alternately until the engine has reached such highway crossing, and shall give such signals in cities and towns as the legislative authorities thereof may require. And the said company shall be liable for damages which shall be sustained by any person by reason of such neglect." Acts 1902-03-04, p. 986, c. 609, § 24, now carried into Va. Code 1904, § 1294d, subsec. 24.

The same Legislature which enacted this statute also, by an act approved March 15, 1904 (Acts 1904, p. 368, c. 253), repealed the first-mentioned act of 1894, thus leaving as the only statute on the subject that found in Va. Code 1904, § 1294d, subsec. 24.

The effect of the existing statute, which limits the duty of sounding the whistle or ringing the bell to occasions when the engine is approaching a highway which the railroad crosses upon

the same level, is to exempt the railroad company from giving such notice when the engine is approaching a point where it crosses the highway on an overhead bridge. The change from the statute of 1894 to the existing law must mean this, or it would accomplish nothing. The purpose of the Legislature was obviously to encourage the abolition of grade crossings which have proved to be such a constant menace to human life, and to encourage the substitution of crossings either above or below the public highway. This is declared to be the legislative policy by the same act which embraces the existing law with respect to crossings. Va. Code, 1904, § 1294d, subsec. 38.

The great danger of railroads crossing public highways at grade is well understood, and the increase of population is adding daily to the number of those who suffer therefrom. Building bridges over highways by railroads, while expensive, is a matter of vast importance and greatly to be desired in the interest of all concerned, and every encouragement should be given to that end. Where the railroad crosses the highway by means of a bridge over it, the statute wisely refrains from imposing the burden, obstruction, or inconvenience of the regulations and precautions applicable to grade crossings. If the railroad, when it avoids the danger of a grade crossing by erecting a bridge over the highway, is to be still required to ring its bell, blow the whistle, and use all the precautions applicable to grade crossings, there would be little inducement to incur the cost of such constructions in the public interest.

We are of opinion that the declaration does not state a case which, under the statute, entitles the plaintiff to recover. The judgment complained of must therefore be reversed, and the verdict of the jury set aside. And this court will enter such judgment as the lower court ought to have entered, sustaining the demurrer to the declaration and dismissing the case with costs.

BUCHANAN, J., concurs in result, but not in the opinion.

Note.

Accident at Crossing—Signals—Frightening Teams.—This decision clearly demonstrates the injustice of the Virginia statute, which requires the railroad company to give warning signals, only where the railroad crosses upon the same level a highway or crossing. In short, no duty is owed to the driver of unmanageable horses, under the particular words of this statute, in order that they may not drive under a bridge, without any warning as to the approach of a train. It has been held repeatedly, under the statutes in other states, that they are also intended to give warning to drivers of vehicles approaching crossings, and that the failure of the defendant to comply with the requirements of the law, whereby the animal driven by the plaintiff is frightened and runs away, thereby injuring the plaintiff. will

render the defendant liable though there was no actual contact between the locomotive and the vehicle or its occupant. Bowen *v.* Gainesville, etc., R. Co., 95 Ga. 688, 22 S. E. 695; Pollock *v.* Eastern Railroad, 124 Mass. 158; Gulf Coast, etc., R. Co. *v.* Breitling, 75 Tex. —, 12 S. W. 1121.

Under the statute imposing a duty upon a railroad company to ring a bell at highway crossings, and making the neglect of such duty a misdemeanor punishable by fine, and declaring that the company shall "be liable for all damages which shall be sustained by any person by reason of such neglect," a person who was unloading corn into a crib on the railroad company's depot ground near two highway crossings can recover from the company for injuries received by reason of his horses becoming frightened at an engine which was driven past, without the required signal being given, although the plaintiff was not at the time attempting to cross the track. Lonergan *v.* Illinois, etc., R. Co., 56 Am. & Eng. R. Cas. 323.

A declaration is sufficient on demurrer if it alleges that the accident resulted from the fright of the horses, caused by the negligence of the defendant in not giving due warning of the approach of a train. This is enough, though it is not alleged, and is not the fact, that any collision occurred between the train and the plaintiff, his wagon or horses. Pollock *v.* Eastern R. Co., 124 Mass. 158; Norton *v.* Eastern Railroad, 113 Mass. 366; Prescott *v.* Eastern Railroad, 113 Mass. 370.

All of the cases cited above were injuries at grade crossings.

But the supreme court of Kentucky, in a decision rendered in 1889, came to a conclusion directly contrary to the decision in the principal case. It was held, that the fact that a railroad crosses a highway on a trestle, does not exempt the railroad company from the duty of giving warning of the approach of its trains to such crossing. We haven't access to the Kentucky statute, and so, can't say what its provisions were. Rupard *v.* Chesapeake, etc., R. Co., 88 Ky. 288, 11 S. W. 70.

In this case the court said: "Injury may occur to the traveler at the crossing in two ways, namely: By a collision with him, or by scaring the horse that he is riding or driving, whereby he is injured. It is the duty of the appellee in approaching a crossing, if danger to the traveler in either of the ways above mentioned may be reasonably apprehended, to give timely notice of its approach, in order that the traveler may not only be warned not to come in collision with the train, but secure himself from injury by his frightened horse. By the trains crossing the highway on a trestle there is no danger of a collision with a traveler on the highway, but, if he should be under the trestle with his horse while the train is passing over it, the danger is increased; for it is well known that a horse is more likely to scare at a sound made over his head than when the same sound is made on the ground. So, where the train crosses a public highway on a trestle, and in view, as above intimated, of the frequency of travel, on horseback or by driving, on the public highway, and the facility of seeing the train as it approaches the crossing in time to prevent injury by securing the horse, the danger of catching the traveler unawares and frightening the horse that he is riding or driving may be reasonably apprehended. It is its duty to give some timely warning of its approach to the crossing; and the question as to whether or not the failure to give such warning is negligence should be left to the jury."